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In The
Supreme Court of the United States.

OCTOBER TERM, 1934

NO. 751

Roy T. Mobley, Petitioner,

vs.

The New York Life Insurance Company.

STATEMENT AND BRIEF FOR THE APPELLEE.

The appellee is of the opinion that this cause requires a more adequate statement than is contained in appellant's brief.

Prior to December 1st, 1930, the New York Life Insurance Company, appellee, had issued and outstanding upon the life of Roy T. Mobley two policies of life insurance: Policy No. 7,802,419 dated April 9, 1925, in the sum of $2,000, Ordniary Life, the mother of the assured being named as beneficiary; Policy No. 10,340,538 in the sum of $5,000 dated August 7, 1932, in which policy the assured's wife was named beneficiary.

The policies were identical in language except as to the date, face of the policies, and the name of the beneficiary. Therefore, by agreement of counsel, only the last named policy is copied into the Record. (R. 5.)

Said policies provide (conditioned upon payment by the insured of insurance premiums therein stipulated, or upon the assumption thereof by the appellee) that upon

receipt at its home office in New York City, New York, of due proof of the insured's death, the appellee should pay to the beneficiaries the full face of the policies; and in addition to the amounts provided to be paid to the beneficiaries, under said policies, the policies provided for payment of monthly disability benefits in the following language:

"Total and Permanent Disability.

"Disability shall be considered total whenever the Insured is so disabled by bodily injury or disease that he is wholly prevented from performing any work, from following any occupation, or from engaging in any business for remuneration or profit, provided such disability occurred after the insurance under this Policy took effect and before the anniversary of the Policy on which the Insured's age at nearest birthday is sixty.

"Upon receipt at the Company's Home Office, before default in payment of premium, of due proof that the Insured is totally disabled as above defined, and will be continuously so disabled for life, or if the proof submitted is not conclusive as to the permanency of such disability, but establishes that the Insured is, and for a period of not less than three consecutive months immediately preceding receipt of proof has been, totally disabled as above defined, the following benefits will be granted:

"(a) Waiver of Premium.—The Company will waive the payment of any premium falling due during the period of continuous total disability, the premium waived to be the annual, semi-annual or quarterly premium according to the mode of payment in effect when disability occurred.

"(b) Income Payments.—The Company will pay to the Insured the monthly income stated on the first page hereof ($10 per $1,000 of the face value of this Policy) for each (Vol. 9) completed month from the commencement of and during the period of continuous total disability. If disability results from insanity, payment will be made to the beneficiary in lieu of the Insured."

The Company had the right, at intervals, to demand due proof of the continuance of total disability, provided such proof should not be required oftener than once a year after the disability had continued for two full years.

Appellant, upon the 25th day of July, 1933, exhibited his declaration, in the Circuit Court of Harrison County, Mississippi, on Policy No. 10,340,538; and upon the first day of November, 1933, the appellant, before the same Court, filed suit upon the first policy, being No. 7,802,419.

The declarations alleged that the plaintiff had become totally and permanently disabled within the meaning of the policies; that the assured had given to the Company due proof of such total and permanent disability. In fact the declaration alleged full and complete compliance, upon the part of the appellant, with the covenants in the poli-

cies of insurance binding upon him. In other words, it was alleged that the policy contracts were executed so far as he was concerned.

The plaintiff alleged in each declaration that the Company made all payments provided for, under said policies, by reason of such total and permanent disability, up to and including the disability payments maturing January 13, 1933; but that it had failed and refused to pay the monthly payments maturing February 13, 1933; but that upon the other hand, upon March 1, 1933, the Company denied that the appellant continued to be totally and permanently disabled, under said policies, and each of them.

In each of said suits the appellant sued for what is known as an anticipatory breach on the part of the appellee of the terms and provisions of each of said policies. The appellant claimed that by reason of said breach the appellee was indebted to him for the then commuted value of all monthly disability payments under said policies, and each of them, based upon the assumption that the appellant would live out his entire expectancy, aggregating $45,580.00; and appellant, plaintiff, also prayed for judgment for the face of each of said policies. (R. 1-25; R. 31.)

Each of the cases was removed to the District Court of the United States, for the Southern Division of the Southern District of Mississippi.

As to the first suit, being No. 998, on Policy No. 10,340,538, in addition to the General Issue, the appellee filed a Special Plea, (R. 34) wherein it was alleged that the appellant, prior to the 13th day of February, 1931, submitted to it proof, from which it appeared, and the appellee be-

lieved, that for a period of not less than three consecutive months immediately preceding receipt of such proof, the plaintiff was totally disabled as defined in said policies. Whereupon as of January 13, 1931, payable February 13, 1931, the appellee approved the plaintiff's disability claim for $50.00 per month, and waived payments of premiums. That the defendant, appellee, had continued to pay to the appellant, said monthly payment of $50,00 per month, up to and including the payment maturing January 13, 1933.

Said Special Plea further alleged that following the th day of January, 1933, the defendant, appellee, received information, which it believed to be true, that the plaintiff was not totally and permanently disabled, as defined in said policy, by reason of which the defendant, appe. id not pay to the plaintiff, appellant, the disability payment maturing subsequent to the last mentioned date.

In its said Special Plea the appellee alleged that subsequent to February 13, 1933, it took diligent steps to ascertain as to whether or not appellant was totally and permanently disabled, within the meaning of the policy; and set out its correspondence with the appellant, in respect thereto. It alleged that it never denied the validity of the policy in question, but merely took the position that the appellant was not totally and permanently disabled, within the meaning thereof, and, therefore, was not entitled to the monthly disability payments.

The appellee alleged that it continued its investigation with the result that upon July 13, 1933 it requested the appellant to re-submit himself to one of its doctors for examination. Such course was had with the result that the ap-

pellee reached the conclusion that the appellant probably continued totally and permanently disabled, within the meaning of the policy. Whereupon the appellee, after receiving the report of said physician, to-wit—upon the 9th day of August, 1933, tendered to the appellant all monthly disability payments, upon each of said policies, maturing subsequent to the 13th day of January, 1933, and issued a waiver of premiums maturing on each of said policies subsequent to said date.

The appellant, through his counsel, refused to accept said disability payments, and/or waiver of premiums upon said policies, but upon the other hand filed the first suit, on Policy No. 10,340,538, upon the 25th day of July, 1933, the very day upon which the appellant re-submitted himself for examination.

Thereafter, upon the first day of November, 1933, the appellant having filed the second suit, on Policy No. 7,802,419, which suit became No. 1001 on the docket of the United States District Court, the appellee filed a Plea of the General Issue, and Notice thereon, equivalent to its Special Plea under cause No. 998.

The said last mentioned, and second suit, being also removed to the United States District Court, as aforesaid, the two causes were consolidated and tried as one cause. (R. 44.)

The appellee not only, upon August 9, 1933, tendered to appellant all monthly disability payments maturing subsequent to January 13, 1933, which were refused; but tendered all accrued monthly disability payments into Court, with its pleadings, and announced its purpose of continuing to do so, so long as the appellant continued totally disabled, within the meaning of the policy.

At the trial of the cause the appellant introduced the testimony of Dr. J. E. Beck, (R. 74); Dr. Fred S. Gay, (R. 126); Dr. E. A. Copeland, (R. 127); who testified to facts indicating that in their judgment the appellant was totally and permanently disabled.

In order to minimize the Record, for the purposes of the first trial only, the parties entered into an agreed statement of facts, (R. 76, 126.) For the purposes of the trial it was agreed that the appellant might be considered as totally and permanently disabled, at that time. (R. 125).

The facts were not in dispute. In the latter part of December, 1930, the plaintiff underwent an operation for acute appendicitis accompanied by gangrene. Subsequent to the operation, to-wit, on or about the 30th day of March, 1931, the appellant claimed that he was totally and permanently disabled as a result thereof, and propounded a claim for total and permanent disability under each of said policies. (R. 77-78).

Blanks were furnished him with which to make proof of his said claim; he submitted himself to one of the company's examiners for examination, with the result that on or about the 20th of April, 1931, monthly disability claims were allowed and paid to him on each of said policies from January 13, 1931; $50.00 under one policy and $20.00 under the other. The company also waived the payment of maturing premiums. (R. 77-88.)

Upon three occasions between the 13th day of January, 1931 and the 1st day of January, 1933, the appellee expressed doubt as to whether or not the appellant was totally and permanently disabled within the meaning of the policies.

During such period, upon more than one occasion, it took the position that the appellant was no longer totally and permanently disabled within the meaning of the policies, and payments of monthly disability claims were temporarily withheld. In each instance, however, as the result of continued correspondence between the parties, payment of monthly disability claims under each of the policies, accompanied by waiver of premiums maturing upon the policies, was had, with the result that upon the 1st day of February, 1933, all monthly disability claims on each of the policies, including those maturing January 13, 1933, had been paid in full, and the appellee had waived all premiums maturing on the earlier policy up to August 9, 1933, and on the second policy, to the 7th day of March, 1933. (R. 87).

Between the 3rd day of January, 1933, and the 22nd day of February, 1933, the appellee received information from which it was of the opinion that the appellant was not totally and permanently disabled, within the meaning of the policies. (R. 111-112).

Accordingly, upon the first of March, 1933, (R. 113-114) it informed the appellant, by letter, that it would discontinue disability payments upon the policies in question, and that the premium falling due February 7, 1933, was payable in conformity with the policy's requirements.

The continuance of the policies in force was conditioned upon the payment of semi-annual premiums, in advance. (R. 4.) Thirty days' grace was allowed for the payment of premiums, and where default was made the insured was permitted to become re-instated within five years, upon evidence of insurability. (R. 9.)

The policies further provided, however, upon default in payment of premium, after three full premiums had been paid, for the purchase of temporary, extended insurance, through the application of the cash surrender value of the policies. (R. 14-15.)

Whereupon there ensued certain correspondence between the appellant, or his counsel, and the appellee; the appellant insisting that he was totally and permanently disabled, within the meaning of the policies, and the appellee insisting that the appellant was not totally and permanently disabled, but at the same time inviting the appellant to submit additional information in support of his contention. (R. 113-116).

As a result of the foregoing, upon March 9, 1933, appellant's counsel demanded of the appellee damages, growing out of an anticipatory breach of said policies, in the amount of $45,580.00. (R. 115-120.)

Whereupon the Chairman of Appellee's Claim Division, under date of July 12, 1933, (R. 120) suggested to appellant's counsel that he re-submit himself to appellee's local physician, at Lucedale, Mississippi, appellant's place of residence. This the appellant did, upon the 24th day of July, 1933, Dr. Dorsett, the examining physician, reporting that the appellant was suffering from chronic Myocarditis. (R. 121-122).

Within a reasonable time thereafter, to-wit—upon the 9th of August, 1933, the appellee's officers and agents concluded from Dr. Dorsett's report that the appellant was probably totally and permanently disabled, within the policies, and thereupon, without delay, tendered to the appel-

lant all monthly disability payments accrued under each of the policies in question, accompanied by a waiver of premiums which would otherwise be payable, which tender was refused by the appellant. (R. 123, 124, 125.)

The appellee called as a witness one Dr. J. C. Huggins who testified that he examined the appellant in January, 1933, and found no trace of myocarditis; that myocarditis would not prevent a man from doing work of any kind; and that myocarditis was curable; that if a patient was suffering therefrom he would be expected to lose weight, and that the appellant lost none. (R. 132-134.)

The appellee called as a witness Frank S. Lantry, Chairman of the Committee on Disability Claims, who testified that his Committee handled from 15,000 to 25,000 claims per year. That it was not always possible to tell with mathematical accuracy whether the insured was disabled. That the Company regarded this as a border line claim, with reference to the total and permanent disability of the insured. That there were periods during which the Company regarded it as an extremely doubtful claim. That the Company had no information, prior to the report of Dr. Dorsett, made July 24, 1933, that the appellant was suffering from chronic myocarditis. (R. 134-137.)

Whereupon, at the conclusion of the testimony a directed verdict was returned, in favor of the appellee, upon which judgment was entered, disallowing the appellant's suit; but directing, however, that the disability payments tendered into Court, which covered all monthly payments which had accrued up to the date of the trial, be awarded and paid to the appellant. (R. 134-142).

An appeal was prosecuted to the United States Circuit Court of Appeals, for the Fifth Circuit. The judgment was affirmed, 74 Fed. (2d) 588, from which judgment this Court has granted certiorari.

ARGUMENT

POINT I.

ORDINARILY NO ACTION LIES ON AN ANTICIPATORY BREACH OF CONTRACT PROVIDING FOR THE PAYMENT OF STIPULATED SUMS OF MONEY AT DEFINITE PERIODS. IN ANY EVENT, BEFORE THE PRINCIPLE IS APPLICABLE AT ALL THERE MUST HAVE BEEN AN ABSOLUTE, UNCONDITIONAL AND UNAMBIGUOUS REPUDIATION OF THE ENTIRE CONTRACT WHILE EXECUTORY ON BOTH SIDES.

(A) Ordinarily no action lies on an anticipatory breach of contract providing for the payment of stipulated sums of money at definite periods.

The appellant, of course, has no right of action in this case at all unless the appellee is liable on the theory of an anticipatory breach, for that the appellee, on August 9, 1933, shortly after the first suit was filed and before the second one was filed, tendered to the appellant and his counsel full and complete performance by the tender of all disability payments then maturing accompanied by waiver of all premiums maturing up to such date, which tender was declined by the appellant and his counsel because damages growing out of the alleged anticipatory breach were claimed. The appellee made its tender good by paying into court up

to the trial of the case all maturing disability claims accompanied by Waiver of maturing premiums. Not only that, but the appellee in making its tender attached no condition thereto. The appellee was perfectly willing that the appellant, without prejudice to any right accruing by reason of the filing of the suits, might accept disability payments and avail himself of the waiver of premiums.

The doctrine of anticipatory breach from time immemorial has been one of limited operation.

A complete investigation of the common law as far back as **Rochester vs. De La Tour**, 2 El. Bl. 678, shows that one party to a contract will be allowed to sue for complete damages for a breach of a contract before such breach occurs, only in three cases, to-wit: Contracts to manufacture and sell goods; Contracts of marriage; and Contracts for personal services.

Other English cases are: **Avery v. Bowden**, 5 Ellis & Blackburn, 714, decided by Lord Campbell, Chief Justice, in 1855; **Barrick v. Buba**, 2 Common Bench (N. S.) 563, decided in 1857; **Frost v. Knight**, Law Reports, 7 Exch. 111, decided in 1872; **Johnstone v. Milling**, 16 Q. B. D. 460, decided in 1886.

The case of **Roehm vs. Horst**, 171 U. S. 1, 44 L. Ed. 953, was a breach of an executory contract for the sale of merchandise. The contract was executory and the buyer gave notice to the seller that no further acceptance of shipments under the contract would be received. This Court held that suit might be brought for an anticipatory breach of the contract, using the following language:

"And the doctrine that there may be an anticipatory breach of an executory contract by an absolute refusal to perform it has become the settled law of England as applied to contracts for services, for marriage, and for the manufacture or sale of goods. The cases are extensively commented on in the notes in Cutter vs. Powell, 2 Smith, Lead, Cas. 1212, 1220, 9th edition by Richard Henn Collings and Arbuthnot. Some of these, though quite familiar, may well be referred to."

The court took care to make it clear that the doctrine of anticipatory breach would only be applied to contracts containing mutually executory obligations, and would not be applied to a monthly contract such as a bond or note, because in those cases one party had fully performed his obligations. The court, speaking through Mr. Chief Justice Fuller, quoting a decision of Mr. Chief Justice Taney, in the case of Greenway vs. Gaither, Federal Cases No. 5788, said:

"It has never been supposed that notice to the holder of a bond, or a promissory note, or bill of exchange, that the party would not (from any cause) comply with the contract, would give to the holder an immediate cause of action upon which he might sue before the time of payment arrived.

"In the case of an ordinary money contract, such as a promissory note, or a bond, the consideration has passed; there are no mutual obligations; and cases of that sort do not fall within the reason of the rule."

Liability for an anticipatory breach rests upon the philosophy that, since the contract at the time of the repudiation thereof was executory upon each side, the injured party would have no right of action of enforcing the original agreement, or suing thereupon, because the time for performance had not arrived. Therefore, as an exception to the general rule, in order to prevent the injured party from being totally deprived of a present remedy, the doctrine of anticipatory breach as a matter of necessity presented itself. As before stated, however, the doctrine from time immemorial was of limited application relating solely to controversies of a special nature, such as above set out. An effort to extend the doctrine, as in the instant case, to the payment of fixed sums of money due at stated intervals is a departure from the original principles upon which the action was founded.

However, as will appear from the authorities hereinafter cited, as a condition precedent to the right of action, the contract must have been executory upon both sides (though it might be partially completed by one of the parties) accompanied by a refusal of the opposite party to perform the contract before default. In this case we have neither of the requisite conditions. (a) The appellant's declaration in each case, as well as the undisputed proof, shows that the contract was completely performed so far as the appellant was concerned. The plaintiff alleges that due and proper proof had been given to the appellee of his total and permanent disability. Assuming that to be true, it became the duty of the appellee to make the monthly payments. The appellant, however, was required to do nothing further. The appellant might instantly have sued

for monthly disability payments. The lack of such right is what gives rise to the doctrine of anticipatory breach. (b) Neither was the second requisite present. The appellee at no time repudiated its contract with the appellant; it always admitted that the appellant was the holder of two outstanding policies of life insurance, both of which were perfectly valid. It was the appellee's claim, not that the contracts of insurance were invalid, but that the occasion had not arisen when the appellant had the right to require the payment of monthly disability claims, in that he was not in a condition of total and permanent disability. Going a step further, the appellant having submitted proof of continued total disability, the time for performance on the part of appellee had arisen and appellant might sue upon the contract so the principles of anticipatory breach did not apply.

(B) The great weight of authority is against the appellant's right of recovery under the facts in this case.

Some importance has become attached to suits of the character involved in this case by reason of the decision in **Federal Life Insurance Co. v. Rascoe**, C. C. A. 6, 12 Fed. (2d) 693, upon which case the appellant relies to support his theory of recovery. The plaintiff there held an accident policy which agreed to pay her the sum of $25.00 per week during the continuance of total disability caused by accidental injuries sustained while a passenger on a common carrier. The plaintiff submitted proofs of such accident and disability and the defendant made a number of payments and then refused to make further payments. The plaintiff sued, not only for installments alleged to have ac-

cmed, but also for the value of future installments. It appeared, however, that the policy required the plaintiff to furnish defendant, insurance company, medical reports every thirty days, showing his or her condition, and the continued existence of the disability. The cause was submitted to the court without a jury, no finding of fact or conclusions of law were asked or made, and as a result the record is in a very unsatisfactory state. The court permitted recovery, not only of past due installments, but of a sum which included either prospective future installments or their present value. The court said that since there was no separate findings of fact, the appellate court had no authority to review the evidence or questions of law presented. The court said, furthermore, that except for plaintiff's disabling injuries, she was in good health, and was likely to live out her expectancy.

The court invoked the rule by holding that the requirement of periodic proofs made the contract executory, using the following language:

> "In this case the plaintiff does not rely upon the anticipatory breach, nor upon mere delay, neglect, or default to pay the several installments due under the terms of this contract, but upon an actual breach, after full proofs of continuing disability had been made in the manner and form specially provided in the policy, coupled with an actual repudiation of the entire contract. A jury was waived, and the trial court found on the issues joined for the plaintiff. Tri-Bullion Smelting Co. v. Jacobson, 233 F. 646, 147 C. C. A. 454. There are no separate findings of fact, and this court has

> no authority to review the evidence or question of law presented by it. Law v. U. S.; supra. But, even if this court could accept the opinion of the trial court, in connection with the motion for a new trial, as a separate finding of fact, it appears therefrom that the courts specially found that defendant was acting in bad faith; that it was guilty of an actual breach and an unequivocal repudiation of the entire contract."

This decision has met with much adverse comment from other courts, federal and state. We know of no case where the doctrine announced has been approved. It is interesting to note, however, that the dissenting opinion of Judge Denison in lieu of the majority opinion has been most favorably received and adopted by a number of courts as stating the correct rule. The opinion of Judge Denison will be found Page 697, and his dissent is based upon the following propositions: (1) that the appellant insurance company had only agreed to pay the plaintiff at monthly periods and that the appellant insurance company should not be held liable for not doing something which it never agreed to do; (2) that the contract was not executory on the part of the plaintiff. All the plaintiff had to do was to wait and could not be damaged by the defendant's refusal to pay; (3) that there was no repudiation of the contract upon the part of the defendant insurance company. It was true that the insurance company had advised the assured that the policy had lapsed for failure to pay premiums thereupon, as to which the defendant was invoking an express provision of the contract and not repudiating the same, that the defendant company had never

denied the validity or binding effect of the contract, had merely taken the position that the time had not arrived when the plaintiff was entitled to the payment of monthly disability claims; (4) that it was utterly unjust to permit the plaintiff to recover upon the basis that she would live throughout her expectancy, whereas, as a matter of fact, she might get well in a short time, or die within a short period. In either case the true liability would be for a shorter period.

We now invite the attention of the court to the decisions dealing with the particular question involved herein as to whether or not an insurance company which denies liability to an insured for a monthly disability claims for the reason that it contends that the insured was not totally and permanently disabled within the meaning of the policy, if mistaken, is liable to the assured for damages, for anticipatory breach of the contract. The great weight of American authority, both federal and state, holds that no such liability exists whatsoever, though the courts in denying recovery to the insured have not been at all times unanimous as to the grounds of denial. The courts have adopted, however, one or more of the reasons for non-liability stated in the dissenting opinion of Judge Denison in the case last cited above.

I. THE STATE LAW UPON THE SUBJECT.

We are well aware of the rule that in questions of important commercial law federal courts are not necessarily bound by state court decisions upon common law questions. This rule does not justify the conclusion, however, that state decisions should be thoroughly disregarded. Upon

the other hand, the policies were delivered and the premiums paid in Mississippi. The policies were Mississippi contracts. **New York Life Ins. Co. v. Dodge**, 38 S. Ct. 337, 246 U. S. 357, 62 L. ed. 772.

In the case of **Trainor vs. Aetna Casualty & Surety Co.**, 290 U. S. 47, 78 L. ed. 162, the Supreme Court of the United States used the following language, which is highly applicable to the present case:

> "It is enough to say that even where the principle applies, 'for the sake of harmony and to avoid confusion, the federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt.' Burgess v. Seligman, 107 U. S. 20, 33, 34, 27 L. ed. 359, 365, 2 S. Ct. 10. And see Sim vs. Edenborn, 242 U. S. 131, 135, 61 L. ed. 199, 203, 37 S. Ct. 36, where the authorities are collected; Community Building Co. vs. Maryland Casualty Co. (C. C. A. 9th) 8 F. (2d) 678, 680."

The doctrine was re-examined and affirmed in **Mutual Life Ins. Co. v. Johnson**, decided by this court December 3, 1934.

The Supreme Court of Mississippi denies the right of recovery upon the part of an assured in such cases, basing its denial of right of recovery upon the broad ground that the policy provided only for the payment of disability claims monthly and the court should not write a new contract for the parties.

The Supreme Court of Mississippi in the case of **Metropolitan Ins. Co. v. Lambert**, 128 So. 750, 157 Miss. 759, held

that under a $2,000 life policy, providing for monthly payments for total disability, the insured, totally disabled, could recover only unpaid matured monthly installments. In that case the insured while employed by the Mississippi Central Railroad Company, suffered a fracture of the wrist, of a very serious character. The wound healed but he was unable to use his hand thereafter. The insurance company denied liability under the total and permanent disability clause of the policy, and alleged that the insured's disability was partial and not total. In bringing his suit the insured asked for not only the installments that were then due him by the insurance company, but also for all future installments under his policy. The jury returned a verdict for the insured without designating the amount of his recovery, and the court entered a judgment thereon for $2,000. The Supreme Court of Mississippi reversed this holding of the lower court, and used the following language:

> "The appellee's policy was for two thousand dollars, but payable, in the event of his becoming totally disabled, in forty monthly instalments of fifty-two dollars and fifty cents each.
>
> "The jury returned a verdict for the appellee, without designating the amount of his recovery, and the court entered a judgment thereon for two thousand dollars. This was error. The declaration alleges the failure of the appellant to pay any of the monthly installments accrued under the policy; and while it prays for a recovery in the sum of two thousand dollars, the only recovery to which appellee was entitled was for the unpaid

monthly installments of fifty-two dollars and fifty cents each; and a judgment should have been entered for the aggregate thereof, with accrued interest, only."

This case was decided prior to the Rascoe case. The rule was re-affirmed by the Supreme Court of Mississippi in the case of **Atlantic Life Ins. Co. v. Serio**, 154 So. 474, and the dissenting opinion of Judge Denison in the Rascoe case adopted as a correct statement of the rule in Mississippi, the court using the following language:

"There was no obligation on the appellant to make these monthly payments in advance, and the appellee could not sue therefor until the time for their payment passed without payment being made. The appellant's contention seems to be supported by Federal Life Ins. Co. v. Rascoe (C. C. A.) 12 F. (2d) 693, but we decline to follow it, and agree with the opinion of the dissenting judge therein."

2. FEDERAL DECISIONS.

This identical question was decided by the Circuit Court of Appeals, 8th Circuit, in the case of **Moore et al v. Security Trust & Life Ins. Co.**, 168 Fed. 496, in which case the plaintiffs were the holders of certain contracts, which, at a definite future date, would entitle them to commissions. The defendant insurance company was bound under its contracts to pay such commissions at the designated time. Prior to the time at which these commissions were to be paid, the defendant company entered into a reinsurance agreement with a rival company, whereby

such company was to take over the assets and obligations of the original insurance company. The plaintiffs contended that by so doing the defendant, insurance company, was making it impossible for it to perform its contracts at the date of performance, and that, therefore, this constituted an anticipatory breach of the contracts; which entitled the plaintiffs to bring an action for the commissions immediately, even though the time for the payment of the same had not arrived. The Circuit Court of Appeals, speaking through Judge Sanborn, thoroughly exhausted the authorities, and held that the anticipatory breach of a contract of this nature did not give the other parties to the contract the right to bring the action for damages prior to the date when the commissions were due, and used the following language:

> "There is another reason why the creation of this disability does not sustain an action for an anticipatory breach of this stipulation of the contract. It is that the rule that the creation of a disability to perform a contract or notice that one will not perform it before the time of performance arrives, warrants an immediate action for damages, applies only to actions on contracts that are mutually executory, such as contracts for marriage, for the rendition of services, or for the transportation or sale and delivery of property, where the covenants of the parties are interdependent and to be simultaneously performed. Illustrations of the contracts to which this rule applies are a contract of life insurance, where the undertakings of the parties are mutually executory and to be perform-

ed from time to time throughout the life of the party (Lowell v. St. Louis Life Ins. Co., supra); a contract for the future services of a courier to be subsequently paid for, where the employee notified the courier that he would employ him before the time for the rendition of the services arrived (Hochster v. De La Tour, 2, El & Bl. (Q. B.) 678, contracts for the delivery of articles purchased in specific portions at different times, to be paid for as delivered (Roehm v. Horst, 178 U. S. 1, 17, 18, 20, Sup. Ct. 780, 44 L. Ed. 853, Nichols v. Steel Company, 137 N. Y. 471, 487, 33 N. E. 561) a contract to Marry (Frost v. Knight, L. R. 7 Ex. 111) and a contract to manufacture articles to be paid for upon delivery (Danube & Black Sea Co. v. Xenos, C. B. (N. S.) 825).

"But this rule is inapplicable to, and it does not govern, actions upon bonds, notes, and upon other contracts to pay money at times specified, where the party of one part has completely executed the contract and it is executory only upon the part of the other party. No action for damages lies before the time of payment arrives against one who disables himself from paying, or gives notice that he will not pay his obligations under contracts of this kind. Roehm v. Horst, 178 U. S. 1, 17, 16, 20 Sup. Ct. 780, 44 L. Ed. 953; Nichols v. Steel Company, 137 N. Y. 471, 487, 33 N. E. 561; Washington County v. Williams, 111 Fed. 801, 810, 40 C. C. A. 621, 630. The claim to recover for the breach of the agreement to pay

the commission on the renewal premiums due after the termination of the agency contract is founded on an agreement of the latter class. The plaintiffs have performed their part of the contract of agency, they have completely earned the commissions, the contract is completely executed on their part, nothing remains executory but the agreement of the defendant to pay the commissions when the renewal premiums are collected, and those premiums had not become due or been collected, and the time had not arrived when the commissions were due when this action was brought. The defendant's creation of its disability to collect the premiums and to pay the commissions did not make the latter due earlier, and it created no cause of action for their present worth, and this action was prematurely brought."

The latest case upon the subject is **Kimel v. Missouri State Life Ins. Co.** (C. C. A. 10) 71 Fed. (2d) 921. In that case the defendant issued a combination life and disability policy. The policy provided for the payment of certain disability claims before the assured reached sixty years of age, but that after the assured reached sixty years of age, instead of obtaining disability payments, the assured was only entitled to the right to allow all premiums to accumulate without interest as an indebtedness. The assured became totally and permanently disabled before he reached sixty years of age but did not make proof thereof until after he reached sixty years of age. The company denied that it owed him anything for such disability claims, and took the position that the assured was liable for the payment

of premiums, that is to say, that the policy was subject to the payment of premiums without interest. The assured filed suit to recover (a) monthly disability claims, (b) anticipatory breach based upon his life expectancy, (c) premiums paid from 1925 to 1930. The District Judge disallowed the plaintiff's claim in its entirety. On appeal to the Circuit Court of Appeals of the Tenth Circuit, opinion by Judge Phillips, it was held (a) that the plaintiff was entitled to recover monthly disability payments accruing prior to the time he reached sixty; (b) assured entitled to recover premium payments; (c) the court held, however, that there was no anticipatory breach and that the assured could not recover total and permanent disability benefits based on the assured's life expectancy. The court used the following language:

> "To amount to an anticipatory breach of a contract, the renunciation by the promissor must be clear and unequivocal, and the refusal to perform must be of the whole contract or a covenant going to the whole consideration.
>
> "Here, as we shall presently undertake to show, Kimel demanded more from the insurance company than he was entitled to receive, and the insurance company offered less than it was obligated to render. Each in good faith insisted on his own interpretation of the contract.
>
> "An offer to perform in accordance with the promissors interpretation of the contract although erroneous, if made in good faith, is not such a clear and unequivocal refusal to perform as amounts to a renunciation giving rise to an anticipatory breach.

"As stated in Armstrong v. Ross, 61 W. Va. 38, 55 S. E. 895, 899:

" 'If this were not the law, it would be a dangerous thing to stand upon a controverted construction of a contract. Every man would act at his peril in such cases, and be subjected to the alternative of acquiescing in the interpretation adopted by his opponent, or putting to hazard his entire interests in the contract. The courts have never imposed terms so harsh, or burdens of such weight. It would amount to a virtual denial of the right to insist upon an honest, but erroneous interpretation.' "

The question was presented in the case of **Wyll v. Pacific Mutual Life Ins. Co.** of California (D.C.) Texas, 3 F. Supp. page 483. The identical question was involved and Judge Atwell decided that plaintiff was not entitled to recover for an anticipatory breach, using the following language:

"The plaintiff relies upon Federal Life Insurance Company v. Rascoe (C. C. A.) 12 F. (2d) 693. In that case Circuit Judge Donahue used the case of Roehm v. Horst, 178 U. S. 1, 20 S. Ct. 780, 44 L. Ed. 953, which is probably the outstanding treatment and announcement of the doctrine concerning the renunciation of a continuing agreement by one party and the result upon the obligation that theretofore rested upon the other party. Circuit Judge Denison, in his dissent, makes a strong showing by the use of the case as a support to his position.

"It is possible that in the Rascoe Case the observation of the court concerning the fact that the finding was a necessary result, since without separate findings of fact neither the evidence nor the question of law was reviewable, is the key to the difference. There a jury trial had been waived and the trial judge had made no findings.

"It is difficult for me to hold that the mere act of the defendant in questioning the plaintiff's right to claim payment of monthly installments as they accrue does thereby create a liability which is not contemplated in the contract of the parties. They agreed among themselves that if and when the plaintiff became disabled so as to 'lose his business time' that he should be paid $500 for every month in which he continued to remain in that condition. It may be true that the condition in which he is now will continue for the remainder of his life. It may be that that can be established by the testimony, but that is not the plaintiff's cause of action as alleged here, nor is it in the contract between the parties. Besides the Rascoe Case and, Roehm v. Horst, supra, there are Howard v. Benefit Association of Railway Employees, 239 Ky. 465, 39 S. W. (2d) 657, 81 A. L. R. 375; Kithcart v. Metropolitan Life Ins. Co. (D. C.) 1 F. Supp. 719; Parks v. Maryland Casualty Co. (D. C.) 59 F. (2d) 736, which interest. See, also, Washington County, Neb., v. Williams (C. C. A.) 111 F. 801; Moore v. Security Trust & Life Ins. Co. (C. C. A.) 168 F. 496; New York Life

Ins. Co. v. English, 96 Tex. 268, 72 S. W. 58; State Life Ins. Co. v. Atkins, (Tex. Civ. App.) 9 S. W. (2d) 290; Dunbar v. Dunbar, 190 U. S. 340, 23 S. Ct. 757, 47 L. Ed. 1084. In the last case we will, of course, see the difference between one who anticipates nonmarriage and one who claims a future disability, but the reasoning is entertaining upon that feature of the plaintiff's cause.

"I think that the demurrers and exceptions which are directed at that portion of the plaintiff's petition which seeks to recover for future months should be sustained. That leaves the cause for trial as to the period which has elapsed since the alleged accident."

The question was again presented in Kithcart v. Metropolitan Life Insurance Company, (D. C. Mo.) 1 F. Supp. 719, where the following language is used:

"Without discussing the technical allegations, of the petitions, or the language of the motions filed by the several defendants, it is sufficient to say that these motions raise the specific question in each case as to the liability of an insurance company for present recovery of future installments when liability has been denied.

"Plaintiffs rely especially on Federal Life Insurance Company v. Rascoe (C. C. A.) 12 F. (2d) 693, 695. This opinion was delivered by the Court of Appeals of the Sixth Circuit. The majority opinion upheld the right to recover upon the whole contract independently of its provisions for future installments.

"However, it was pointed out by the court that there was no separate finding of facts in the case, which was tried to the court without the intervention of a jury. The court said: 'Without such separate findings of facts, neither the evidence nor the question of law presented by it is reviewable by this court.'

"It was then said by the court that the plaintiff 'does not rely upon an anticipatory breach, ... but upon an actual breach, ... coupled with an actual repudiation of the entire contract.'

"In order to bring the case within the doctrine of Roehm v. Horst, 178 U. S. 1, 20 S. Ct. 780, 786, 44 L. Ed. 958, the court said: 'This contract, therefore, is not an unconditional promise to pay a sum certain in installment, or in gross; where plaintiff has fully performed. On the contrary, she is required every thirty days to submit her person to the examination of a physician and pay the physician for making such examination and for preparing a report in writing to be forwarded to the company.'

"The following statement was made because of the almost universal doctrine that, in the absence of mutual obligations, recovery cannot be had for future installments, as in the case of Bonds and Notes. In other words, in the absence of mutual obligations, future installments cannot be matured on the grounds of a breach of con-

tract. The rule was well stated in the Horst case supra, as follows: 'We decide simply this case where there are material provisions and obligations interdependent.'

"The following principle was announced in the Horst case, supra, which appears applicable here: 'We think it obvious that both as to renunciation after commencement of performance and renunciation before the time for the performance has arrived, money contracts, pure and simple, stand on a different footing from an executory contract for the purchase and sale of goods."

"The instant cases are 'money contracts, pure and simple.' Each of the defendants promised to pay money installments upon certain contingencies. It is claimed by the plaintiffs that the certain contingencies have occurred. The obligations of the defendants are to continue the payment of certain installments so long as such contingencies exist.

"It is true that the defendants required proof of the continuing existence of the conditions upon which their obligations rested. There was no contractual duty upon the plaintiffs. Their contractual obligations were to pay premiums, and then, upon the happenings insured against, liability accrued against the defendants. This court cannot accept as law the statement of the majority opinion in the Rascoe case, supra, that the mere examination of a physician every thirty

days imposed upon the insured an executory contractual obligation, although such question is not in this case.

"The plaintiffs are not required to sue for installments not yet matured. All they need to do is to sue for matured installments, and, if successful, the judgment would not be a bar to further suits on installments hereafter maturing."

The same conclusion was reached by District Judges in the following cases: **Hines v. Fidelity Mutual Life Ins. Co.** (D. C. N. Y.) 6 Fed. Supp. 692; **Menssen v. Travellers Ins. Co.** (D. C. N. Y.) 5 Fed. Supp. 114; **Ginsburg v. Pacific Mutual Life Ins. Co.** (D. C. N. Y.) 5 Fed. Supp. 296; **Lavecchia v. Connecticut Mutual Life Ins. Co.** (D. C. N. Y.) 1 Fed. Supp. 588.

The question was again presented in **Parks v. Maryland Casualty Company** (D. C. Mo.) 59 Fed. (2d) 737, opinion by Judge Otis, wherein the following language is used:

"The theory that an insured in a policy of accident insurance may presently sue for the recovery of what by the terms of the insurance contract might be coming to him in the future if there is a repudiation of the entire contract by the insured has quite often been presented as in the petition here, since a decision by the Court of Appeals for the Sixth Circuit in Federal Life Ins. Co. v. Rascoe, 12 F. (2d) 693, 697. The decision in that case was chiefly based on the opinion of the Supreme Court of the United States in Roehm

v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 785, 44 L. Ed. 953. The Rascoe case represents the extreme development of the theory. It was decided by a divided court, a very convincing dissenting opinion by Circuit Judge Denison holding that the majority had in its application of the law to the facts extended the doctrine of Roehm v. Horst beyond the limits of that doctrine as it was declared by the supreme court.

"The petition here, in the part thereof now under consideration, is not good even under the majority opinion in Federal Life Ins. Co. v. Rascoe. That opinion holds that before a suit for damages for future payments may be maintained the contract must be executory on both sides. But it was ruled that the particular contract there considered was executory on both sides since there remained for the insured certain things to be done before he was entitled to continue payments for total disability. The difference between the dissenting opinion and the majority opinion chiefly is the view of Judge Denison that the contract was not executory on the part of the insured, that the things which were yet required of him were conditions precedent to the receipt of future payments and not obligations imposed upon him by the contract.

"The Rascoe case does not support the petition here, because the plaintiff here alleges he has performed all obligations required of him by the

contract. Nothing remains for him to do; so far as he is concerned, if the allegations of the petition are to be taken at their face value, the contract has been executed."

The appellant in the present case alleges full and complete compliance on his part with every condition precedent to liability on the part of the appellee. (R. 2.)

In the instant case, **Mobley v. New York Life Insurance Co.**, C. C. A. 5, 74 Fed. (2) 588, the court, speaking through Judge Sibley, used the following language:

"Ordinarily, breach of a contract cannot occur until performance is due. In case the promisor prevents performance or disables himself to perform, a right of action at once accrues. In some classes of contracts, while executory on both sides, notably those for personal services and for the purchase or manufacture of goods, or for marriage, a total repudiation of the contract by one party before the time for performance may at the option of the other be treated as a present breach, excusing him from performance on his part and enabling him to sue the repudiator at once for all resulting damages; or he may decline to treat it as a breach and elect to keep the contract in force, tendering performance on his part at the time fixed by the contract and demanding performance of the repudiator. Hochester v. De La Tour, 2 El. & Bl. 678; Pierce v. Tennessee Coal, I. & R. Co., 173 U. S. 1, 19 S. Ct. 335, 43 L. Ed. 591; Roehm v. Horst, 178 U. S. 1, 20 S. Ct. 780, 44 L. Ed. 953.

This doctrine of an anticipatory breach does not apply to commercial paper or in general to simple promises to pay money due on an executed consideration. It is said in Kelly v. Security Mutual Life Ins. Co., 186 N. Y. 16, 78 N. E. 584, 9 Ann. Cas. 661, approved in Killian v. Metropolitan Life Ins. Co., 251 N. Y. 44, 166 N. E. 798, 64 A. L. R. 956, to be confined to contracts to marry, for service, and for goods to be manufactured or delivered, and to have no application to insurance policies. But in Lovell v. St. Louis Life Ins. Co., 111 U. S. 264, 4 S. Ct. 390, 28 L. Ed. 423, the doctrine was applied to a repudiation by the insurer of an unmatured life insurance contract, but the recovery was measured not by the present worth of the face of the policy but by the amount of premiums paid less the value of the insurance already enjoyed, now generally called the reserve value of the policy. In Federal Life Ins. Co. v. Rascoe, (C. C. A.) 12 F. (2d) 693, the doctrine was applied by a divided court to render collectible at once both past and future disability payments as here contended for, and Mobley relies strongly on that case. It has been more conspicuously distinguished and disapproved than followed. In federal courts see Kithcart v. Metropolitan Life Ins. Co. (D. C.) 1 F. Supp. 719; Wyll v. Pacific Mutual Life Ins. Co. (D. C.) 3 F. Supp. 483; Menssen v. Travelers' Ins. Co. (D. C.) 5 F. Supp. 114; Ginsburg v. Pacific Mutual Life Ins. Co. (D. C.) 5 Fed. Supp. 296; Hines v. Fed. Mutual Life Ins. Co.

(D. C.) 6 Supp. 692. It seems opposed in principle to the decision in the Eighth Circuit in Moore v. Security Trust & Life Ins. Co. (C. C. A.) 168 F. 496, where in effect it is held that while an executory contract of life insurance is capable of anticipatory breach, no contract to pay money is capable of it after it has become executed on the part of the promissee."

The court also used the following language:

"On a war risk insurance contract for example, it has never been supposed that the insured by winning a contest touching his rights, even when they were totally denied, could recover the present value of future installments contrary to the very terms of the insurance. Compare United States v. Worley, Adm'x, 281 U. S. 339, 50 S. Ct. 291, 74 L. Ed. 887. Anticipatory breach cannot with this effect be asserted in the present case."

The most recent decision on the subject is that of **Kanelidis v. Great Northern Life Ins. Co.**, D. C. Minn., decided March 27th, 1925, where the court used the following language:

"To found the basis of an anticipatory breach, the repudiation or refusal to perform the contract must be a positive one, so as to leave no doubt as to the parties final determination in this respect.

"Fed. Law. (Contracts) Book 2, page 221, Sec. 447, and authorities there cited.

"The finding that there was no renunciation of the contract is sufficient to defeat this action.

"However, there is a further reason why the plaintiff cannot predicate his action upon an anticipatory breach.

"It is well settled that where a contract is executory upon both sides and is repudiated by one party, the other may presently have his damages assessed as for an anticipatory breach. But the rule excepts cases where the contract on the plaintiff's part is not executory.

"Roehm v. Horst, 178 U. S. 1; 20 S. Ct. 780; 44 L. Ed. 953; Menssen v. Travelers' Ins. Co., 5 Fed. (2) 114; Wyll v. Pacific Mutual Life Ins. Co. of Calif., 3 Fed. Sup. 483; Kithcart v. Metropolitan Life Ins. Co. and Kevan v. John Hancock Mut. Life Ins. Co., 1 Fed. Sup. 719; Parks v. Maryland Cas. Co., 59 Fed. (2) 736.

"In the case of Roehm v. Horst, supra, Judge Fuller said:

" 'We think it obvious that both as to renunciation after commencement or performance and renunciation before the time for performance has arrived, money contracts, pure and simple, stand on a different footing from executory contracts for the purchase and sale of goods.'

"The present case involves a contract for the payment of money, pure and simple.

"Plaintiff relies upon the case of Federal Life Ins. Co. v. Roscoe, 12 Fed. (2) 693. That case does

not dispute the rule as stated above, but the Court there held that the contract was executory. Judge Donahue, writing the opinion, said:

"'While the plaintiff in this case has fully discharged her obligation to pay the premiums coming due prior to her injuries, and has continued to pay the premiums until the insurance company declined to accept further payments, nevertheless it is averred in the bill of complaint that by the express terms of this contract she is still required to furnish, and has furnished, regularly to the insurance company, every 30 days, or as near thereto as may be reasonably possible, a report in writing from her attending physician or surgeon, fully stating the condition of the assured and the probable duration of her disability.'

"And so holding that there were mutual, unperformed obligations on both sides and that the contract was a bilateral contract, recovery was permitted on the basis of an anticipatory breach.

"That decision was by a divided court. Judge Denison, dissenting, holds that the contract was unilateral and that the plaintiff had not stated a cause of action, and his opinion has been approved by all of the cases that have been decided since which have been called to my attention.

"The stipulations in the present case as to furnishing evidence of the continuing existence of the conditions, are not the same as those referred

to by Judge Donahue in the Rascoe case, but if they were I cannot agree with the statement that the contract was still bilateral by reason of the fact that proof was required of the continuing existence of disability. The contract in the present case does stipulate that the insurance company may send its physician to examine plaintiff from time to time to see if the disability still continues, but that imposes no contractual duty upon the plaintiff. All of the plaintiff's obligations had been performed. The plaintiff's contractual obligation was to pay the premiums until total and permanent disability occurred. If he did that and disability occurred there was nothing remaining for him to do."

3. DECISIONS FROM OTHER STATES:

The decision of the Circuit Court of Appeals, Fifth Circuit, in the instant case is in accord with the great weight of authority from state courts.

ARKANSAS:

In the case of **Mutual Life Insurance Company of New York v. Marsh,** (Ark.), 56 S. W. (2) 433, in which it appeared the plaintiff was issued a disability policy by the defendant company in 1922, and had become disabled four years later in 1926. The company paid him regularly until 1930, when it declined to make further payments upon ascertaining that the insured had been elected circuit clerk of Nevada County. The insured claimed that this was a repudiation of the contract, and sued for all future installments under

his policy. The Supreme Court of Arkansas refused to allow plaintiff to recover, holding that the facts and circumstances did not, in any wise, show an unqualified renunciation of the contract on the part of the insurance company, and said:

> "The court instructed the jury on the question of damages to the effect that if they found the appellee totally and permanently disabled within the meaning of the policy, they might return a verdict for a sum equal to the present value of the monthly benefit payable monthly during the period of appellee's life expectance. The appellant contends that this was error, and in this contention we agree. . . . . In the instant case there was not a refusal to carry out the contract and a renunciation of the agreement, but in the course of the correspondence between the parties when default was first made in the payment, there was simply the contention that under the existing facts, the insured for the time being was no longer entitled to the monthly benefits. Recognizing that there had been no repudiation of the contract, appellee paid the premium January 25, 1932, and testified that the policy was still in effect, and in his complaint, alleged that the contract had been put in force in January, 1922, and had remained in full force and effect at the time of the filing of the suit. The appellant in its answer expressly disavowed any repudiation, but affirmed the contract and merely contended that under its terms the appellee was not entitled to the monthly benefits."

Opposing counsel cite the case of **Aetna Life Insurance Co. v. Phyfer, 160 Ark. 98, 254 S. W. 335.** That case was distinguished in the case of **Mutual Life Insurance Co. v. Marsh,** the Court using the following language:

> "This makes this case unlike that of Aetna Life Ins. Co. v. Phyfer, 160 Ark. 98, 254 S. W. 335, 337, relied upon by appellee. In that case the plaintiff was allowed to recover the present value of the future benefit installments because the court found that there had been a total repudiation of the contract, in that the insured, by letter, had in express words denied liability on the claim that the policy had lapsed. The court said: 'This letter evinced an intention on the part of appellant not to be bound by the terms of the contract, and was equivalent to a renunciation thereof.' That case followed the rule in Roehm v. Horst, supra."

The rule announced in the Marsh case was re-affirmed by the Supreme Court of Arkansas in the case of **Massachusetts Protective Association v. Jurney, 68 S. W. (2) 455.**

And the doctrine was again announced in the case of **Jefferson Standard Life Insurance Co. v. Slaughter, 79 S. W. (2) 58.**

CALIFORNIA:

In the case of **Brix v. People's Mutual Life Ins. Co., 37 Pac. (2) 448,** and the case of **Cobb v. Pacific Mutual Life Ins. Co., 40 Pac. (2) 574,** recovery was denied, and the cases of **Metropolitan Life Ins. Co. v. Lambert, 157**

Miss. 759, 128 So. 750, and Howard v. Benefit Ass'n, 239 Ky. 465, 39 S. W. (2) 657, 81 A. L. R. 375, cited with approval.

KENTUCKY:

In the case of Howard v. Benefit Association, 239 Ky. 465, 39 S. W. (2) 57, 81 A. L. R. 375, where the same question was involved, the Court declined to follow the Rascoe case, and approved the dissenting opinion of Judge Denison, using the following language:

> "As pointed out in the dissenting opinion of Judge Denison, the case of Roehm v. Horst, 178 U. S. 1, 20 S. Ct. 780, 44 L. Ed. 953, cited in the majority opinion, declared that, where a contract is executory on both sides and is repudiated by one party, the other may presently have his damages assessed as for an anticipatory breach, but it excepts from that rule cases where the contract on the plaintiff's part is not executory."

The question was again examined in Woods v. Provident Life & Accident Insurance Co., (Ky.), 42 S. W. (2) 499, and the case of Howard v. Benefit Ass'n cited with approval. The Court used the following language:

> "The policy provides when and how the monthly accident indemnity shall be paid, and appellant will be confined to the provisions of the policy in that respect."

The question was re-examined and the rule re-announced in the case of Prudential Ins. Co. v. Cox, (Ky.), 71 S. W. (2) 31. And the Court again declined to follow the majority opinion in the Rascoe case, and expressed its

concurrence in the rule announced in Judge Denison's dissenting opinion.

MINNESOTA:

In the case of **Garbush v. Order of United Commercial Travelers of America,** 228 N. W. 148, the Supreme Court of Minnesota expressly refused to follow the decision of the majority of the court in **Federal Life Ins. Co. v. Rascoe,** supra, but chose to follow the well-reasoned dissenting opinion of Judge Denison. The Court, speaking through Mr. Justice Hilton, said:

> "Defendant cited Federal Life Insurance Co. v. Rascoe, (C. C. A.) 12 Fed. (2) 693, in support of its contention that suit covering the $1,300.00 could have been brought at once after disallownce of claim. The majority opinion in that case supports defendant's position. We, however, do not agree. Our view is in accord with a strong dissenting opinion of Judge Denison, in so far as the same is applicable to the present case. Here, there is an executory contract where there is nothing for plaintiff to perform."

The question was again examined by the Supreme Court of Minnesota in the case of **Reismuller v. Prudential Ins. Co.,** 256 N. W. 187, liability was denied, the majority in the Rascoe case disapproved, and the dissenting opinion of Judge Denison again referred to with approval.

MISSOURI:

In **Puckett v. National Annuity Ass'n,** 114 S. W. 1039, (134 Mo. App. 501), the policy provided for the payment of $75.00 every three months for ten years upon

the loss of one eye. The plaintiff lost an eye, and defendant paid one installment and then, because of some misunderstanding, ceased further payments. At the trial of the case it offered the payment on judgment for the accrued installments, but the trial court entered judgment for a lump sum for all the installments to become due over a period of ten years. This judgment was reversed, the court holding that the theory was only applicable in certain special cases, that the plaintiff would not be barred by the bringing of one action, and that it was, therefore, unfair to the defendant to permit such recovery. The court used the following language:

> "Stipulations in the contract in suit were that any liability under it should be paid in the form of annuities in quarterly installments, and that the means of defraying these payments should be the dues and assessments collected monthly from members. These provisions would be disregarded, and respondents accorded a greater right than their agreements accorded them, if appellant was forced to pay the whole amount of the annuity at once, and, perchance, out of assets not raised from monthly dues and assessments."

The Circuit Court of Appeals of Missouri affirmed its holding in the foregoing case in the recent cases of **Allen v. National Life & Accident Ins. Co.**, 67 S. W. (2) 534; **Chipley v. National Life & Accident Ins. Co.**, 67 S. W. (2) 992; **Buis v. Prudential Ins. Co. of America**, 77 S. W. (2) 127.

NEW YORK:

In the case of Kelly v. Security Mutual Life Ins. Co., (Court of Appeals of New York), 78 N. E. 684, the court refused to establish the rule that the anticipatory breach of an insurance contract rendered the insurance company personally liable for damages to the insured, although the date of payment was not then due, and said:

> "An attempt to repudiate such a contract does not make it due. If the maker of a promissory note, given for borrowed money and due one year after date, notifies the holder the next day that he repudiates it and will not pay it, can the holder sue at once? Can a mortgagor make his mortgage due before the law by repudiating it in advance? The rule that renunciation of a continuous executory contract by one party before the day of performance gives the other party the right to sue at once for damages, is usually applied only to contracts of special character, even in the jurisdiction where it obtains at all. It is not generally applied to contracts for the payment of money at a future time, and in some states the principle is not recognized in any way whatsoever. Daniels v. Newton, 114 Mass. 530, 19 Am. Rep. 384; Stanford v. McDill, 6 N. D. 536, 72 N. W. 938, 38 L. R. A. 760; Carstens v. McDonald, 38 Neb. 838, 57 N. W. 757; King v. Waterman, 55 Neb. 324, 75 N. W. 830. In other states and in the federal courts, the principle is adopted but applied with caution. Roehm v. Horst, 178 U. S. 1, 17, 18, 20 S. Ct. 780, 44 L. Ed. 953; Schmidt v. Schnell,

70, Dec. 657; Brown v. Odill, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660; Reedling's Sons v. Fence Co., 130 Ill. 660, 22 N. E. 518; Unexcelled Fire Works Co. v. Polites, 130 Pa. 536, 18 Atl. 1058, 17 Am. St. Rep. 788. In this state, it seems to be limited to contracts to marry, (Burtis v. Thompson, 42 N. Y. 236, 1 Am. Rep. 516); for personal services, (Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285), and for the manufacture or sale of goods, (Windmuller v. Pope, 107 N. Y. 674, 14 N. E. 436; Nichols v. Scranton Steel Co., 137 N. Y. 471, 33 N. E. 561). At least, we have not extended it to mutual life insurance policies, perhaps for the reason that the question of fact opened to unscrupulous persons by such extension might undermine the solvency of the company and inflict gross injustice upon the other policyholders."

In Donlen v. Fidelity & Casualty Co., 192 N. Y. Sup. 513, the insured was disabled by insanity. Suit was brought for the commuted value of all installments based upon the life expectancy of the insured. The court held that the policy itself provided when, and how, and under what circumstances payments would be made, the provisions in this case were that they should be made weekly; that it was evidently the intention of the parties to pay only at the stated time, and plaintiff could recover nothing in addition thereto. The court suggested, furthermore, that there was no such refusal or denial of liability as would in any event furnish grounds for damages. The court used the following language:

"The proof shows that she is suffering from an incurable malady, and, based upon the assumption that the incompetent would never fully recover, this action was brought to recover an amount to be based upon the expectance of life of the incompetent as shown by the Northampton Tables, the defendant having first disclaimed all liability under the policy. Plaintiff cannot, however, succeed on this branch of the case. The policy states definitely when and under what circumstances the defendant is required to pay, and and its refusal to pay the full amount of the weekly indemnity specified in the policy, based upon its belief that the plaintiff is not entitled to the maximum of such weekly benefits, is not such a refusal to pay or such a denial of its liability as would in any event furnish grounds for an action to recover the full amount of the loss at this time. But, aside from that reason, the policy states definitely when and under what circumstances the weekly indemnity is to be paid, and the plaintiff cannot recover in this action the full amount of plaintiff's damage based upon her expectance of life. It was the intention of the parties, as evidenced by the policy, to pay only at the time and in the manner specified in the policy."

The case of **Kelly v. Security Mutual Life Ins. Co.**, 78 N. E. 634, 186, N. Y. 16, was qouted with the approval in the case of **Killian v. Met. Life Ins. Co.**, 251 N. Y. 44. In that case, the court needed to define the word "contest" under a provision of the policy that the policy was incontest-

able after two years. The defendant company had denied liability within two years, but had taken no steps in regard to contesting the same, and no suit had been brought thereon. In the opinion, written by Judge Cardozo, the Court said:

> "Repudiation of a policy is notice that a contest will ensue if insured or beneficiary shall make attempt thereafter to enforce a claim of right. It is not a contest of itself. Repudiation before maturity (the subject of the contract being a policy of insurance) is not even such a breach as will sustain a remedy at law for the recovery of damages, (Kelly v. Security Mutual Life Ins. Co., 186 N. Y. 16), though it may be the occasion for a declaratory judgment or other remedy in equity."

In the case of **Charles I. Gilbert, Respondent, v. New York Life Insurance Company, Appellant,** 238 N. Y. App. Div. 544, it was said:

> "The cases in this State hold that where an insurance company repudiates its obligations, there cannot, in any event, be any recovery of the premiums paid. (Skudera v. Metropolitan Life Insurance Co., 17 Misc. 367; Keyser v. Mutual Reserve Fund Life Association, 60 App. Div. 297; Speer v. Phoenix Mutual Life Insurance Co., 36 Hun, 322). Each of the authorities above cited clearly holds that in the event of the wrongful forfeiture and repudiation by the insurance company, the insured may not, in any event, recover back premiums that he had paid. While those cases also hold that a recovery may be had by way

of damages for the breach, the Court of Appeals, in Kelly v. Security Mutual Life Insurance Co. (186 N. Y. 16), overruled said decisions in that respect, the Court of Appeals holding that the doctrine of allowing damages for an anticipatory breach should not be extended to mutual life insurance company cases. The decision in Kelly v. Security Mutual Life Insurance Co. (supra) was recently cited with approval by Chief Judge Cardozo in the case of Killian v. Metropolitan Life Insurance Co. (251 N.Y.44). At the bottom of page 48, Judge Cardozo had this to say, with reference to a contract for life insurance: 'Repudiation before maturity (the subject of the contract being a policy of insurance) is not even such a breach as will sustain a remedy at law for the recovery of damages (Kelly v. Security Mut. Life Ins. Co., 186 N. Y. 16), though it may be the occasion for a declaratory judgment or other remedy in equity.'"

NORTH CAROLINA:

In the case of Green v. Inter-Ocean Casualty Co. of Cincinnati, Ohio, 167 S. E. 38, recovery was denied, and the prevailing rule adopted.

OKLAHOMA:

The rule announced in the Circuit Court of Appeals, Fifth Circuit, in the instant case is the prevailing rule in the State of Oklahoma. Mid-Continent Life Ins. Co. v. Walker, (Okla.) 260 Pac. 1109; Mid Continent Life Ins. Co. v. Christian, (Okla.) 36 Pac. (2) 72.

TENNESSEE:

In the instant case, the Circuit Court of Appeals, Fifth Circuit, cited, as supporting the prevailing rule, the case of **Atkinson v. Railroad Employees' Mutual Relief Society**, 22 S. W. (2) 631.

TEXAS:

The following Texas cases directly support the rule announced in the instant case: **New York Ins. Co. v. English**, 72 S. W. 58; **State Life Ins. Co. v. Atkins**, 9 S. W. (2) 290; **Huey v. American National Ins. Co.**, 45 S. W. (2) 340; **American Bankers Ins. Co. v. Moore**, 73 S. W. (2) 620.

The American Law Institute, Restatement of the Law of Contracts, paragraph 318, announces the following rule:

> "318. Anticipatory Repudiation as a Total Breach. Except in the cases of a contract originally unilateral, and not conditional on some future performance by the promisee, and of a contract originally bilateral that has become unilateral and similarly unconditional by full performance by one party, any of the following facts, done without justification by a promisor in a contract before he has committed a breach under the rules stated in Section 314-315, constitutes an anticipatory repudiation which is a total breach of contract: (a) A positive statement to the promisee or other person having a right under the contract, indicating that the promisor will not or cannot substantially perform his contractual duties."

The same rule is announced in Williston on Contracts, Vol. III, Sec. 1329, page 2382; Page on Contracts, Vol. V, Sec. 2891, page 5107.

4. APPELLANT'S CASES DISTINGUISHED:

We have heretofore distinguished the case of **Federal Life Ins. Co. v. Rascoe,** (C. C. A. 6), 12 Fed. (2) 693, and the Court will have observed the unfavorable criticism in respect to the case.

We have also heretofore referred to the case of **Roehm v. Horst,** 178 U. S. 1, 44 L. Ed. 953, cited by the appellant. As heretofore pointed out, this not only does not support the appellant's contention, but is adverse thereto.

The remaining cases cited by appellant are not at all in point, as will hereinafter appear.

1. In **Pakas v. Hollingshead,** 184 N. Y. 211, 77 N. E. 40, the entire case is stated in the syllabus, which is in the following language:

> "Where goods are sold to be delivered and paid for in installments, and the vendor refuses to deliver an installment, it is a breach of the entire contract, for which the vendee may immediately recover his damages or he may wait until the time for the delivery of the goods has expired and then recover, but he can not maintain successive actions to recover for a breach of delivery of each installment so that a judgment for damages for nondelivery of a part of the goods is a bar to an action for failure to deliver the balance."

2. In the case of **Colorado Yule Marble Co. v. Collins,** 230 Fed. 78, the appellant employed the appellee to do certain construction work for it. After the appellee had proceeded with the performance of the contract, the appellant

requested that the work be stopped, and refused to permit the appellee to proceed therewith. The appellee sued for accrued estimates on the work, as well as the profits which he would have made. The Circuit Court of Appeals justified the recovery, using the following language:

> "As bearing upon the first three of these points, it should be borne in mind that this was a partially executed contract, and a number of the authorities agree that there is a difference between contracts wholly executory and those executed in whole or in part. But in Roehm v. Horst, 178 U. S. 1, 20 S. Ct. 780, 44 L. Ed. 953, the Supreme Court, after a most exhaustive consideration of both English and American authorities, held substantially that there was no difference between purely executory and partly executed contracts, and that where one party to a contract clearly and positively renounced his contract before any part of it was executed, a cause of action for the loss of profit accrued at once to the other party. That opinion is quite conclusive, so far as it goes, up this court, as it was upon the District Court."

3. In **Aetna Life Ins. Co. v. Gehr**, (C. C. A. 9), 50 Fed. (2) 657, the agent of the appellant Insurance Company delivered a policy to the assured which provided that it should not become effective except and unless the first premium was paid. The Insurance Company contended that the policy was delivered to the assured merely for inspection. Concurrently therewith, however, the assured met death entitling the beneficiary to the benefit of the double

indemnity of the policy, provided the policy was in force. The company denied all liability under the policy, claiming the benefit of the provision therein contained to the effect that the policy was not to become effective except and unless the first annual premium was paid in cash. Under the Civil Code of California, however, (see page 658) the delivery of the policy made the same effective. The Court held that recovery might be had upon the policy without making proof of death and without waiting to the end of what is known as the endowment term. In other words, that the beneficiary was entitled to sue immediately. In that case, however, it will be noted that there are the following differences:

(a) The California statute invalidated the clause in the policy that the policy should not become effective.

(b) The defendant Insurance Company fully and completely repudiated, in the most absolute terms, the obligation.

(c) It will be further noted that the assured was dead, and the beneficiary was permitted to recover the benefits under the policy without waiting until the maturity thereof; that is to say, the expiration of the term time period.

4. In the case of Carnig v. Carr, 167 Mass. 544, 35 L. R. A. 512, there was involved merely the question of the mutuality of the contract of employment and the application of the statute of frauds.

5. In the case of Hinckley v. Pittsburgh Bessemer Steel Co., 121 U. S. 264, 30 L. Ed. 967, the syllabus correctly states the case, which is in the following language:

"1. In an action to recover damages for the breach of a written contract for the purchase by the defendant of 6,000 tons of steel rails, on the special findings of the court below, it is held: That the failure of the defendant on due notice to furnish drilling directions, together with his request to postpone the delivery of the rails, and, also, with a notice that he was not ready to accept and pay for them, excused the plaintiff from actually manufacturing and tendering them; and that the measure of damages is the profit the plaintiff would have made less the profit realized on rails made from the material purchased by the plaintiff with which to perform the contract. 2. This court will not reverse a judgment for alleged errors in the admission of evidence, which could not have prejudiced the plaintiff in error."

6. In the case of **Indiana Life Endowment Co. v. Reed,** (Appellate Court of Indiana), 103 N. E. 77, the opinion of the court contained the following language:

"With few exceptions, the courts of England and America have held that the renunciation of an executory contract, either before or after the time of performance, has arrived, or the refusal to carry out the provisions of a contract in course of performance, gives a right of action to the injured party for the damages sustained by reason of such breach or repudiation of the contract. A denial of all liability, where liability has attached, is held to give the injured party the right to treat the contracts as broken or repudiated and to pur-

sue his remedy for damages for the breach, and to recover, once for all, in a single suit all that may ultimately be due him."

7. The case of **Lovell v. St. Louis Mutual Life Ins. Co.**, 111 U. S. 264, 28 L. Ed. 423, bears no relation whatever to the instant case. There the company agreed with the assured that after three full annual premiums were paid, if default should be made in the payment of a premium, a paid up policy would be issued to him for the amount of insurance which the premium would purchase. After paying three full premiums, the assured surrendered the policy to the company, with the request that such a policy be issued to him. The company took the policy and kept it. In the meantime, it sold out to an entirely different company, which returned the policy to the assured, with the endorsement that the policy was in force for a stipulated amount, provided interest on the assured's notes was paid. The Court held that this was a breach of the contract, and that the plaintiff might recover of and from the reinsuring company whatever he was entitled to under said contract with the original company. The assured was never at any time at fault in the performance of his obligation.

8. In the case of **Nicholas v. Scranton Steel Co.**, 137 N. Y. 487, 33 N. E. 566, the court held that in a contract for the sale of certain commodities, the defendant had entirely repudiated the contract, and the plaintiff, not being at fault, the contract still being executory on each side, might sue for damages sustained.

9. In the case of **Pearce v. Tenn. R. R. Co.**, 173 U. S. 1, 43 L. Ed. 591, the plaintiff—appellant—was injured

while in the employ of the appellee railroad company; and, in settlement of his claim for injuries, the railroad company agreed to employ him for the remainder of his life at a stipulated wage. The agreement was carried out by the railroad company for several years. Thereafter, it completely repudiated all liability to the plaintiff, and the plaintiff brought suit against the company for all damages sustained, or to be sustained, treating the contract as terminated. The contract was executory upon both sides, and being so executory, the railroad company having repudiated the entire contract, this court held that the plaintiff should be permitted to recover.

10. In the case of **Vicksburg & M. R. R. Co. v. Putnam**, 118 U. S. 545, 30 L. Ed. 257, plaintiff was permanently injured by the negligence of the defendant railroad company. The court held that the plaintiff was entitled to recover for the loss of earning capacity, using the following language:

> "In an action for personal injury, the plaintiff is entitled to recover compensation, so far as it is susceptible for an estimate in money, for the loss and damage caused to him by the defendant's negligence, including not only expenses incurred for medical attendance, and a reasonable sum for his pain and suffering, but also a fair recompense for the loss of what he would otherwise have earned in his trade or profession, and has been deprived of the capacity of earning by the wrongful act of the defendant. Wade v. Leroy, 20 How. 34, 15 L. Ed. 813; Nebraska City v. Campbell, 2 Black, 590, 17 L. Ed. 271; Ballou v. Farnum, 11 Allen 73; New Jersey Exp. Co. v. Nicholas, 3 Vroom,

166, and 4 Vroom, 434; Phillips v. London & Southwestern R. Co., 4 Q. B. D. 406. 5 Q. B. D. 78, and 5 C. P. D. 280; S. C. 49, L. J. Q. B. 233."

The case was reversed upon other grounds.

11. Prudential Insurance Co. of America v. Faulkner, (C. C. A. 10), 68 Fed. (2) 676, was a case where, under a disability policy, defendant had at its option either one of two methods of paying,—paying by the month or paying in a lump sum. When it repudiated the contract, and refused to pay according to either method, and its liability being settled, the court held that it had waived its right to elect its method of settlement.

The case of Bu-Vi-Bar Petroleum Corp. v. Krow et al., 40 Fed. (2) 488, was a total and unconditional repudiation and abandonment of the entire contract calling for the performing of personal services.

The case of Reed Brothers v. Bluff City Motor Co., 139 Miss. 441, 104 So. 161, falls within the same distinction.

In the case of Mutual Reserve Fund Life Ass'n. v. Ferrenbach, (C. C. A. 8), 144 Fed. 342, the policy issued was one where premiums were assessed covering the current death losses of the company with added sum for expense. The company wrongfully undertook to rescind the contract for the alleged nonpayment of premium. The insured could obtain no other insurance. He was an invalid and died before the suit was tried. The court used the following language:

> "At any rate, death has solved all uncertainty. The policy was for $5000.00 and was payable at death."

The court held that the case had very special features withdrawing it from the usual rule, using the following language:

"The peculiar features of this case withdraw it from the operation of the rules which most frequently find application. In a policy issued upon what is termed the level premium plan, the insured has an equity arising from an excess of premiums paid above the current cost of insurance to the company. Under such a plan, the natural premiums for the respective years, which steadily and progressively increase as the insured advances in age, are so adjusted and averaged among the years of his expectancy of life that they become flat or level, the same in amount in the beginning as at the end. In such a case, it is apparent that the earlier level premiums contain an appreciable excess over the actual cost of insurance, which decreases, however, with the progress of the years. So it is said that in a level premium policy the insured has an equity, the excess of payment above the cost of insurance, which constitutes an element of damage resulting from wrongful cancellation. Such was the policy in the case of Lovell v. Insurance Co., 111 U. S. 264, 4 Supt. Ct. 390, 28 L. Ed. 423. But the Lambert policy is of an entirely different character. It was issued upon the assessment plan, and each year's premiums represented the actual current cost to the association of carrying the insurance risk. There was no excess over

cost out of which an equity or value could arise. Insurance Co. v. Roth, 59 C. C. A. 63, 122 Fed. 853."

The cases of **Leek Milling Co. v. Langford**, 81 Miss. 728, 33 So. 492, and **Bolling v. Red Snapper Sauce Co.**, 97 Miss. 785, involved a total repudiation and abandonment of contracts for the sale of commodities while the contracts were executory on both sides.

The case of **Carter v. Witherspoon**, (Miss.), 126 So. 388, involved a contract for the performing of personal services, which was repudiated entirely while executory.

The case of **Travelers' Protective Ass'n. v. Stevens**, (Ark.) 49 S. W. (2), 364, is readily distinguished, as appears from the statement of the court at page 368, where the following language is used:

> "The defendant denied that it was liable to the plaintiff for any amount under the terms of the policy. It did not offer to pay him the weekly indemnity for total disability as long as such disability should continue. It sought to defeat his claim altogether."

The case of **National Life & Accident Insurance Co. v. Whitfield**, (Ark.), 53 S. W. (2), 10, is controlled by subsequent decisions from the Supreme Court of Arkansas, in which the **Aetna Life Insurance Co. v. Phyfer**, 160 Ark. 98, 254 S. W. 335, is distinguished.

Other cases cited by appellant are readily distinguished in the light of the cases cited herein.

There are no facts in this record which take the case out of the prevailing rule. Appellant's counsel take the position that the appellee should have recognized that the appellant was totally and permanently disabled. That it wrongfully denied liability for monthly disability claims by reason whereof it breached its contract, and the appellant should recover the commuted value of all monthly disability payments on each of the policies, based upon the theory that he would live throughout his expectancy. Appellant's counsel in their brief direct the court to the reports submitted by the appellant to the company, from which it is contended that the appellee should have recognized the appellant's total and permanent disability. The appellant underwent an operation for appendicitis in December, 1930. His disability claim was allowed as of January 13th, 1931. On three separate occasions between the 13th day of January, 1931, and the 1st of January, 1933, the appellee expressed doubt as to whether or not the appellant was totally and premanently disabled within the meaning of the policies. During such period, upon more than one occasion, it took the position that the appellant was no longer totally and permanently disabled within the meaning of the policies, and payments of monthly disability claims were temporarily withheld. In each instance, however, as the result of continued correspondent and exchange of information, the payment of monthly disability claims under each of the policies, accompanied by waiver of premiums maturing upon the policies, was had, with the result that upon the 1st day of February, 1933, all monthly disability claims on each of the policies, including those maturing January 13th, 1933,

had been paid in full, and the appellee had waived all premiums maturing on the earlier policy up to August 9th, 1933 and on the second policy to the 7th of March, 1933. (R. 76-196).

Prior to the maturity of the disability claims maturing February 7th, 1933, the appellee reconsidered the claim. The appellant was a lawyer almost 31 years of age, was operated on for appendicitis by Dr. H. R. Shands of Jackson, Mississippi, who reported to the company on April 13th, 1931, (R. 80), that he had treated the appellant for for nothing but appendicitis and indicated that there was nothing about the appendicitis operation which would cause him to be totally and permanently disabled.

Under date of April 15th, 1931, (R. 83), the company's examiner, Dr. Huggins, reported that appellant was satisfactorily recuperating and should be able to go to work in sixty days. And again under date of June 24th, 1931, Dr. Huggins reported that the appellant was able to attend to duties not requiring hard labor or excessive exertion, (R. 87). Again under date of August 6th, (R. 93-94), Dr. Huggins, the company's examiner, reported that the appellant was able to do mental work.

Under date of May 4th, 1932, (R. 102), Dr. Beck of Mobile, Alabama, reported some myocardial insufficiency, but was unwilling to state that such trouble was functional. However, on or about the 24th day of January, 1933, the assured submitted himself for re-examination to Dr. I. C. Huggins, the company's examiner at Jackson, Mississippi, (R.110-112), who examined him thoroughly, and who stated that the appellant suffered from low blood pressure, seemed

to have no energy, and complained of indigestion. That Dr. Beck had diagnosed his case as heart trouble, and again (R. 113), Dr. Huggins stated that he was of the opinion that the appellant could do some work. Dr. Huggins testified at the trial (R. 132) that he had examined the appellant very carefully on January 26th, 1933, that he found no indication whatsoever of heart trouble. He testified, however, that myocarditis would not have prevented the appellant from working. He stated that if the appellant was suffering from myocarditis or indocarditis, he would have lost weight, whereas, as a matter of fact, no such condition existed. As a matter of fact, the record did not disclose that the appellant had lost any weight. The appellant and the appellee continued to correspond on the subject, (R. 112-120) until July 12th, 1933, when the appellee suggested to appellant's counsel that he submit himself for re-examination to some other physician.

The position of the appellee at all times was that if the appellant was totally and permanently disabled, he was entitled to his monthly disability claim with waiver of premium. On former occasions the appellant had required the appellee to submit himself to its examiner at Jackson, Mississippi, Dr. Huggins, but in order to inconvenience the appellee as little as possible requested that he permit Dr. Dorsett, a physician residing in the same community with appellant, to examine him, with the result that Dr. Dorsett reported that he was suffering with myocarditis. (R. 120-124). This was the first information that the company had that the appellant was suffering from myocarditis. The former reports had revealed some form of heart trouble. The company understood that the same was based upon

blood pressure, and not upon objective symptoms of a heart condition, (Testimony Frank S. Lantry, R. 137), whereupon the company promptly waived premiums upon the policy in question and tendered all accrued monthly estimates upon each of the policies. The tender was unconditional and has been continued. While the question of good faith upon the part of appellant is not at issue, since appellant's declaration (R. 1) charges no bad faith, there was no proof offered of dislike or ill will. Upon the other hand, Dr. Huggins, the company's examiner, testified that, while he did not know the appellant intimately or other than casually, personally he liked him. The appellee in making out his defense offered to prove by Mr. Lantry that claims of this character offered a very broad opportunity for fictitious claims, to which testimony the appellant objected. The court desired to know upon what theory the appellee offered such proof. Counsel explained that it was for the purpose of meeting any charge of bad faith, to which appellant's counsel replied that the appellant complained of breach of the contract and not bad faith, and that the question of bad faith was not in issue. Whereupon the trial court excluded the appellee's testimony. The record is as follows:

> "Q. Please tell the Court in claims of this character, without any reflection upon the plaintiff whatsoever, whether or not there is a very broad or wide opportunity for fictitious claims?
>
> "By Mr. Mize: Object to that.
>
> "By Mr. Watkins: They are charging us with bad faith. We want to show the only—
>
> "By the Court: Do you charge bad faith?

"By Mr. Mize: My objection is, if the Court please, it is just a question of breaching the contract, or whether he did not, and the good faith or bad faith is immaterial.

"By the Court: The Court will sustain the objection. Just charged with a breach. That is the reason I sustain the objection." (R. 134).

The question, of course, as stated by appellant's counsel, did not turn upon the presence or absence of good faith. The appellant was relying upon a breach of the contract which justified it in treating the same at an end and suing for breach thereof. It must be borne in mind, however, that under the policy contracts, the appellee was not liable for monthly disability claims if the appellant was able, without substantial injury to his health, to do any kind of work. **Lumbra v. United States**, 290 U. S. 551, 54 S. Ct. 272.

Even the presence of serious bodily disability did not necessarily render the assured totally and permanently disabled. **Nicolay v. United States**, 51 Fed. (2d) 170; **United States v. Harrison** (C. C. A. 4th), 49 Fed. (2d) 227; **Long v. United States** (C. C. A. 4) 59 Fed. (2d) 602; **United States v. Linkhart**, (C. C. A. 7) 64 Fed. (2d) 747. So even if it be true that assured had some kind of heart trouble, of which the appellee had notice, he was a young man, a member of a profession which required no serious physical exertion, and it was for such reason that the appellee came to the conclusion and acted thereupon, subsequent to January 1st, 1933 up until August 9th, 1933, that the appellant was not totally and permanently disabled.

POINT II.

THE CONTRACTS WERE FULLY EXECUTED SO FAR AS THE APPELLANT WAS CONCERNED, AND APPELLEE'S REMEDY ADEQUATE.

All monthly disability claims were paid by the appellee upon each of the policies involved up to and including the payments maturing January 13th, 1933. Refusal was had, however, by the appellee to make the payment falling due February 13th, 1933. The appellant's declaration alleges, (R. 1) and the undisputed proof shows, that prior thereto the appellant had submitted to the appellee all the proof thereof which the appellee had the right, under the terms of the contracts, to require from the appellant. He had submitted himself when requested to appellant's examiner and had filled out the additional blank furnished him by the appellant, (R. 19). Assuming that upon February 13th, 1933, the appellant was totally and presumptively permanently disabled within the meaning of the policy, the appellee was in default, and upon the 14th day of February, 1933, the appellant might have sued the appellee for monthly disability upon each of the policies in question. The contract was executed so far as the appellant was concerned, and the time for performance on the part of the appellee had arrived. It was unneccessary for the appellant to pay the premium on either policy if he continued totally disabled. The policy contracts provided, (R. 6), as follows:

> "In event of default in payment of premium after the Insured has become totally disabled as above defined, the Policy will be restored and the benefits shall be the same as if said default had

not occurred, provided due proof that the insured is and has been continuously from date of default so totally disabled and that such disability will continue for life or has continued for a period of not less than three consecutive months, is received by the Company not later than six months after said default."

If the appellant was totally and permanently disabled, proof thereof having been submitted by the appellant, premiums were no longer payable under either policy, and as Judge Denison says in his dissenting opinion, there was no necessity for plaintiff to take any steps. A judgment for the plaintiff for monthly disability claims would have carried with it the adjudication that the appellant was totally and presumptively permanently disabled and that the appellee was not liable for further premiums during such disability, and such adjudication would have had the effect of waiving the premium. A judgment for the plaintiff for a period of disability would have been no bar to a subsequent action. **Williams v. Luckett**, 26 So. 967, 77 Miss. 394; **Rosso v. New York Life Ins. Co.**, 157 Miss. 469, 128 So. 343.

The appellant being so disabled could recover not only the monthly disability payments in default, but interest thereupon, which is the usual measure of damages for failure to pay the fixed sum of money. See Restatement of the Law Contracts pp. 337; **Armstrong v. American Exch. Nat. Bank**, 133 U. S. 433, 10 S. Ct. 450, 33 L. ed. 747; **Potter v. Gardner**, 5 Pet. 718, 8 L. ed. 285; **Northern Pacific R. Co. v. Goss**, 203 Fed. 904, 122 C. C. A. 198; **Milburn v. Thirty-Five Thousand Boxes of Oranges and Lemons**, 57 Fed. 236, 6 C. C. A. 317; **Bain v. Peters**, 44 Fed. 307.

Adequate facilities for instituting such a suit were afforded to the appellant in the court of a Justice of the Peace, and upon the recovery of a judgment therefor, and if the appellee should appeal the case to the Circuit Court, it would have been subjected not only to the payment of claims, but interest, costs and 10% damages. If an appeal should be prosecuted to the Supreme Court of the State of Mississippi from such judgment, the interest would be compounded, and to which would be added 5% damages. See Mississippi Code 1930, Sections 67, 704, and 3387. Such liability has been deemed sufficient to deter any insurer from capricious denial of liability for disability claims. Appellant suggests, however, that in filing suit for disability claims without payment of the premiums upon the policy, he might be subjected to the hazard of the actual forfeiture of the policies for nonpayment of the premiums, if in fact, it should appear that he was not totally and permanently disabled within the meaning of the policy. This merely amounts to the statement that the appellee company, with its claim office situated a long distance from the appellant's locality, must be able to determine the genuineness of the appellant's total disability with more accuracy than the claimant himself. The proof showed that the appellee in the City of New York maintained a large claim department, and that there were propounded against it approximately 25,000 claims per annum. (Lantry, R. 134). However, the appellant's apprehensions are unfounded.

As pointed out by Judge Cardozo in the case of Kelly v. Security Mutual Life Ins. Co., 186 N. Y. 16, the claimant would be entitled to an equitable remedy. Certainly, such

remedy would be available to a claimant under the declaratory judgment act of Congress in the federal court, and if totally and permanently disabled within the meaning of the policy, would be able to obtain, not only the preservation of the contract with waiver of premiums, but could secure a personal decree for accrued disabilities, and under the equity practice, a solicitor's fee would be taxed in favor of the complainant. A meritorious claimant would be entitled to equitable relief in Mississippi. See Franklin Fire Ins. Co. v. Taylor, 52 Miss. 441, Liverpool, London & Globe Ins. Co. v. Hinton, 77 So. 652, 116 Miss. 754, Palmetto Fire Ins. Co. v. Allen, 114 So. 145, 148 Miss. 97.

And for a capricious and willful breach of the contract on the part of the insurer, if such there was, a reasonable attorney's fee might be included as part of the equitable relief. Y. & M. V. R. Co. v. Consumers Ice & Power Co., 57 So. 657, 109 Miss. 43.

POINT III.

THE APPELLEE AT NO TIME REPUDIATED ITS CONTRACTS OF INSURANCE WITH THE APPELLANT.

Appellant's counsel call attention to the fact that, as to Policy No. 10,340,538, premium maturing February 7, 1933, on March 1st, 1933, seven days before the expiration of the thirty days of grace for the payment of the premium, appellee took the position that the appellant was not, on February 7th, 1933, totally and permanently disabled within the meaning of the policy, and that the premium maturing February 7th, 1933, payment of which had theretofore been waived, should be paid, (R. 113). Upon April 13, 1933, the premium not having been paid, the appellee re-

quested the appellant to become reinstated, for which purpose blank was enclosed, (R. 117); and upon June 5th, 1933, there having been no application for reinstatment, appellant was advised that the cash surrender value of the policy had been applied to the purchase of extended insurance, (R.118), which carried the policy for the full face to June 20th, 1937. The premium under Policy No. 7,802,419 had previously been waived up to July 7th, 1933. The usual premium notice was sent out advising the appellant of the maturity of such premium about June 7th, 1933, (R. 118). During the period of grace, however, the appellant re-submitted himself to Dr. Dorsett and, under date of August 9th, 1933, the appellee tendered all accrued monthly disability payments under each of the policies and waived maturing premiums upon both policies, which course of action has been consistently adhered to by the appellee up to the present time. The appellee was not repudiating appellant's contracts of insurance by such action, but assuming as it did, that the appellant was not continuously totally and permanently disabled within the meaning of the policy, it was invoking the very terms of the policy contracts themselves. The payment of the premiums was the essence of the policies in question. **Bergholm v. Peoria Life Insurance Co.**, 76 L. Ed. 416, 284 U. S. 489.

The policies provided for the payment of a semi-annual premium thereupon, and the existence of the policies was conditioned upon the payment of the premiums; if the premiums were not paid on or before the expiration of the thirty days of grace, the policies lapsed subject to the right of reinstatement, and if there was no reinstatemtn, the policies provided, where three full annual premiums had been

paid, for the application of the cash surrender value of the policy towards the purchase of extended insurance upon default. The appellee was merely calling the appellant's attention to the consequences which would follow non-payment of premiums, assuming that he was not totally and permanently disabled within the meaning of the policies. The appellee was reaffirming, rather than repudiating, the policies. The appellee did not deny the existence or the validity of either of the policies of insurance. Upon the other hand, appellee expressly admitted the binding effect of each of them. It admitted that if the appellant was totally and permanently disabled within the meaning of the policies in question, he was entitled to and should have the monthly disability payments therein provided, with waiver of premiums. The disagreement between them was not over the existence or the validity of either of the policies. The disagreement was in respect to the question of total and permanent disability within the meaning of the policies, as a matter of fact. It was the position of the appellant that he was totally and permanently disabled and could do no work of any kind except at the hazard of his health. The appellee admitted that he was suffering from some physical disability, but took the position that he could do some work in connection with his profession without harm or injury to himself.

Policy No. 10,340,538 was automatically carried, by reason of its cash surrender value, to June 20th, 1937, without the payment of any premiums (R. 164). This period may be beyond the life of the insured, but certainly the appellee was not repudiating the contract. That question

was presented in the case of Kimel v. Missouri State Life Ins. Co., 71 F. (2d) 923 C. C. A. In that case the insurer, in violation of its contract with the insured, refused to waive the payment of premium, but made an endorsement upon the policy, charging the premium to the policy, with interest thereupon. The court, in passing upon the question, used the following language:

> "An offer to perform in accordance with the promisor's interpretation of the contract although erroneous, if made in good faith, is not such a clear and unequivocal refusal to perform as amounts to a renunciation giving rise to an anticipatory breach.
>
> "As stated in Armstrong v. Ross, 61 W. Va. 38, 55 S. E. 895, 899:
>
> "'If this were not the law, it would be a dangerous thing to stand upon a controverted construction of a contract. Every man would act at his peril in such cases, and be subjected to the alternative of acquiescing in the interpretation adopted by his opponent, or putting to hazard his entire interest in the contract. The courts have never imposed terms so harsh, or burdens of such weight. It would amount to a virtual denial of the right to insist upon an honest, but erroneous, interpretation.'"

For, as here, the insured was demanding of the Company more than he was entitled to. As early as March 9, 1933, (R. 114) appellant's counsel demanded $28,980.00 from the appellee. The appellee had done nothing but in-

dicate that the assured was not totally and permanently disabled and that the premium maturing on Policy No. 10,340,538 February 7, 1933, which should be paid by the 7th of March, 1933, was due. At that time the premium under Policy 7,802,419 was paid up to July 7, 1933, and the premium was not requested until June 7, 1933 (R. 115). The utmost that may be said about the situation is that the parties disagreed about their legal rights.

In the case of **Federal Life Ins. Co. v. Rascoe**, supra, the policy had no cash surrender value, and the company undertook to cancel the same for non-payment of premium in accordance with the terms of the policy. Judge Denison in his dissenting opinion points out that the defendant did not question the validity of the contract. They disagreed about the insurer's obligation to pay under the facts. Judge Denison used the following language:

> "Further, I do not find in the facts such an absolute repudiation of the contract as justifies the application of the anticipatory breach rule. Such a repudiation cannot be found in the final cancellation made by the insurance company; that cancellation was an act in express pursuance of the contract, and not in repudiation of it; it was a termination of future liability, and not at all a repudiation of any accrued and existing obligation. Nor can it be found, as I think, in the refusal to pay. What defendant really did was to deny that there was any breach which had obligated it to pay or which obligated it to pay any more. Defendant never has questioned the entire validity of the contract, or denied its continuing liability

to pay anything which, under the contract, it ought to pay. While there are decisions which find the necessary basis in a mere denial or breach, I doubt whether they give due regard to what ought to be the character of a repudiation effective to create an obligation inconsistent with the express terms of the contract."

Necessarily in each of the cases cited herein in support of appellee's theory of this case, where there was a failure to pay the premium upon denial of liability for monthly disability claims, by the very terms of the policy itself the same results would follow. In the case of **Kimmel v. Missouri State Life Ins. Co.**, 71 Fed. (2) 921, in respect to repudiation of the contract the court used the following language:

"To amount to an anticipatory breach of a contract, the renunciation by the promisor must be clear and unequivocal, and the refusal to perform must be of the whole contract or of a covenant going to the whole consideration."

Citing:

"Roehm v. Horst, 178 U. S. 1, 20 S. Ct. 780, 44 L. Ed. 953; Dingley v. Oler, 117 U. S. 490, 6 S. Ct. 850, 29 L. Ed. 984; McNamara v. Cerf (C. C. A. 2) 4 F. (2d) 997; Suburban Impr. Co. v. Scott Lumber Co. (C. C. A. 4) 67 F. (2d) 835, 837, 90 A. L. R. 830; Frank F. Pels Co. v. Saxony Spinning Co. (C. C. A. 4) 287 F. 282; Peoskey Portland Cement Co. v. E. V. Benjamin Co. (C. C. A. 6) 296 F. 9, 11; Goldwyn Distributing Corp.

v. Brenneman (C. C. A. 8) 13 F. (2d) 105, 107; Hoggson Bros. v. First Nat. Bank of Roswell (C. C. A. 8) 231 F. 869."

The same rule was announced by the Circuit Court of Appeals, 5th Circuit, in the instant case, using the following language:

"And for another reason there could here be no recovery. In order to constitute an anticipatory breach of the entire contract there must be a clear and unequivocal repudiation by the promisor of all that remains to be performed, a refusal to be further bound by the contract. Dingley v. Oler, 117 U. S. 496, 6 S. Ct. 850, 29 L. Ed. 984; Roehm v. Horst, 178 U. S. 1, 20 S. Ct. 780, 44 L. Ed. 953; Kimel v. Missouri State Life Ins. Co. (C. C. A.) 71 F. (2d) 921, and cases cited. A reading of the correspondence above set out discloses that at no time did the insurance company renounce or repudiate its policies, but founded everything it did upon the terms of them. Even its declaration of lapse and invitation to reinstatement were no repudiation, but in pursuance of their express provisions. All that happened was that the company misjudged its obligations. Such an error made in good faith, whether founded in mistake of law or fact, is not repudiation, and does not end a continuing contract, but calls only for its enforcement according to its terms. Mutual Life Ins. Co. v. Marsh, 186 Ark. 861, 56 S. W. (2d) 433; Massachusetts Protective Ass'n v. Jurney, 188 Ark. 821, 68 S. W. (2d) 455. In this

case the company acknowledged its error and tendered full compensation, together with costs. The insured had no right to anything more.

"Judgment affirmed."

POINT IV.

THE RULE CONTENDED FOR BY APPELLANT IN THIS CASE WOULD BE DISASTROUS TO THE OTHER POLICYHOLDERS IN THE APPELLEE COMPANY.

The appellee, the New York Life Insurance Company, is a mutual company. The position of the appellant is based upon the assertion that appellee, at its peril, must clearly determine its liability to the appellant for monthly disability payments; that the mere failure of the appellee to accurately determine such liability and to make disability payments in accordance with the terms of the policies, converted such contracts from monthly disability payment policies to matured claims for the then present value of all monthly disability payments, assuming that the appellant would live throughout his expectancy and continue totally disabled during such period.

The proof shows undisputedly that there are many claims presented for disability payments which might be termed boundary line claims,—that is to say, doubtful claims,—and the appellee regarded this case as a boundary line claim. The appellee offered to prove, but the District Judge excluded the testimony because appellant's counsel made no contention of bad faith, that these claims afford a very wide opportunity for fraudulent and fictitious claims. We make this statement, with all deference to the

present litigant and his counsel, without reference to the present case. There are many cases in which the disability is not total. The insured may work, or be able to work, a considerable part of the time.

In the case of disability claims there must be honest differences of opinion, and where the company believes that the claim is not justified it should have the right to appeal to the courts without a bludgeon being held over its head.

We call the attention of the court to the following facts:

We have examined the Federal Digest War Risk Cases from January 1, 1931, to January 1, 1935, and there are 254 reported cases. In only one case was a verdict directed for the defendant. There were 253 verdicts rendered for plaintiffs; of these, the appellate courts reversed 130, holding that the evidence was insufficient to go to the jury. In 123 cases, however, the courts held that, while the jury might have decided either way, the evidence was sufficient to sustain a verdict for the plaintiff. Facts in respect to such litigation in state courts during the same period are practically as follows:

Total number of cases 150; verdict for plaintiffs by the jury in each case except one where the court directed verdict for defendant, 25 cases reversed on appeal, evidence being insufficient. In 125 cases evidence held sufficient to justify verdict either way. So, it is apparent that cases of this character present a very strong appeal to juries.

If appellant's theory is to be adopted, in each of the foregoing cases where plaintiff's evidence was held sufficient to justify a verdict for the plaintiff, though a verdict for the defendant might have been rendered under the same facts, as a matter of law the insured plaintiff would have the right to treat the contract as rescinded and recover damages on an anticipatory breach, and would be entitled to the commuted value of all monthly disability benefits to his expectancy.

If this view is to prevail, suits upon monthly disability claims will disappear and, in place thereof, so long as the companies would last, suits would be brought for an anticipatory breach. Such a course would have a disastrous effect upon the interest of other policyholders in mutual companies.

At the last meeting of the American Bar Association a very interesting paper upon this subject was read by the Hon. John F. Handy of Boston, Mass., wherein the following language was used:

> "Under the disability claim where the company has either admitted liability or courts have adjudged the insured entitled to the benefits, the insurer is required to set up a reserve to meet its future liability under such claim. This reserve is based on sanctioned mortality tables based on impaired lives and the insurance departments of the several states have recognized and approved such a method of anticipating future liability. However, under the anticipatory breach theory where the determination of damages is purely

speculative and based on mortality tables for unimpaired lives, the amount of the judgment would be in many cases at least five times the amount of the reserve which the company would be required to set up under the laws to meet its obligations under the contract.

"This leads to the inevitable conclusion that a universal acceptance of applying the doctrine to disability contracts would result in the insolvency or the impairing of the solvency of every insurance company selling such contracts. This is a serious result and affects every policyholder in the country. While in a few isolated cases there may be insurers who will deny liability in bad faith with the resultant expense placed on the policyholders to collect his just claim, yet the sanctioning of such doctrine would result in a far greater loss to the public at large so that the few must suffer in order that the welfare of the group may be assured."

In the case of Kelly v. Security Mutual Life Insurance Company (App. Court of New York), 78 N. E. 684, the court said:

"In this state it seems to be limited to contracts to marry (Burtis v. Thompson, 42 N. Y. 236, 1 Am. Rep. 516); for personal services (Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285) and for the manufacture or sale of goods (Windmuller v. Pope, 107 N. Y. 674, 14 N. E. 436; Nichols v. Scranton Steel Co., 137 N. Y. 471, 33 N. E. 561).

At least we have not extended it to mutual life insurance policies, perhaps for the reason that the question of fact opened to unscrupulous persons by such extension might undermine the solvency of the company and inflict gross injustice upon the other policyholders."

In the instant case the Circuit Court of Appeals, Fifth Circuit, used the following language:

"If he were allowed a present recovery for all future benefits, the calculations on which insurance business is done would be upset, and the purposes for which the benefits were made payable only in installments would often be defeated. On a war risk insurance contract for example, it has never been supposed that the insured by winning a contest touching his rights, even when they were totally denied, could recover the present value of future installments contrary to the very terms of the insurance. Compare United States v. Worley, Adm'x, 281 U. S. 339, 50 S. Ct. 291, 74 L. Ed. 887. Anticipatory breach cannot with this effect be asserted in the present case."

In the dissenting opinion of Judge Denison in the Rascoe case, the following language is used:

"In my judgment, this case illustrates the evils of laxity in permitting a premature recovery. In such a case as this (as facts often are, though possibly not in this case), plaintiff in a year or two may recover entirely or (if the case

is as bad as here claimed) is very likely not to live long. In either case the true liability is for a short term; but the recovery has been upon the basis of the full expectation of life of a healthy person,—though no error in this respect was duly saved."

POINT V.

THE APPELLANT'S EVIDENCE AS TO DAMAGE WAS SO SPECULATIVE AND INDEFINITE AS NOT TO PERMIT A VERDICT AND JUDGMENT IN HIS FAVOR.

The appellant at the time of the trial of this case was thirty-two years of age. He had an expectany, according to the proof, of 34.63 years (R.128), using the table of mortality applicable to normal healthy persons. Notwithstanding the position of appellant that he was totally and permanently disabled, it was his position that he would probably never recover, but might live out his expectancy. J. E. Beck, (R. 74); Dr. Gay, (R. 128); Dr. Copeland, (R. 127).

We respectfully submit that, as to whether or not the appellant would recover, was a matter of conjecture; and if he did or did not recover, how long he would live was purely a matter of speculation. Certainly, the appellant could not recover except and unless he could show the jury: first, as to whether or not he would ever cease to be disabled, and if so, how many years would elapse; and second, if he continued totally disabled, how long he would live. But we submit, if Your Honors please, this was a matter purely of conjecture.

It is the position of the appellant that the jury should have been permitted to cross the gulf and, notwithstanding the total lack of testimony, determine without any sufficient evidence these important facts. Merely to state the proposition is to answer it. Before a plaintiff may recover, the burden of proof rests upon him to prove each and every substantial allegation in his declaration, not always by direct testimony, circumstances are permissible; but, whether by direct or circumstantial evidence, the proof must be furnished and the matter may not be left to doubt, conjecture and speculation. A number of things might happen to the appellant: first, he might continue totally disabled and live out his expectancy; second, he might ultimately recover; third, he might die prior to his expectancy. But which of these three things will happen, was not susceptible to proof and, certainly, was not in this case proven, either by direct or circumstantial evidence.

It is universally held that unless the plaintiff shall produce substantial evidence to establish every material element in his case, a peremptory instruction should be directed for the defendant. **Jenkins & Reynolds v. Alpena Portland Cement Co.** (C. C. A.) 147 Fed. 641; **Virginia & S. W. Ry. Co. v. Hawks** (C. C. A.) 160 Fed. 348; **Wilson v. Eisner** (C. C. A.) 282 Fed. 38.

Evidence which raises a mere conjecture or suspicion is not sufficient to take the case to the jury. **R. R. Co. v. Howe** (C. C. A.) 191 F. 776.

A case is properly taken from the jury where the evidence rests upon conjecture and speculation. **Gill v. Waterhouse** (C. C. A.) 245 Fed. 75.

The rule is well established that damages which are uncertain or speculative cannot be made the basis of recovery. **Vicksburg v. Ragsdale, 46 Miss., 458; Y. & M. V. R. R. Co. v. Williams, 114 Miss., 236; 74 So., 835; Cincinnati Illuminating Co. v. Western Siemens Lungren, 152 U. S. 200, 38 L. Ed. 411; Union Pacific Ry. v. Taggart, 149 U. S. 698, 37 L. Ed. 905; Hollweg v. Scharfer Brokerage Co., 197 F. 689; Ralph v. Rathburn Co., (C. C. A.) 75 F. 971.**

The only damages which may be recovered are such as may be proven with reasonable certainty. **Hollweg v. Scharfer Brokerage Co., 197 F. 689.**

No recovery may rest upon guess work or inference. **Smelting Co. v. Riverside Dairies & Stock Farm, (C. C. A.) 236 F. 510; Western Union v. Totten, (C. C. A.) 141 F. 533; South African Reduction Co. v. Beck, (C. C. A.) 120 F. 88.**

SUMMARY

We respectfully submit that the judgment of the Circuit Court of Appeals in the instant case should be affirmed for the following reasons:

(1) The policies sued upon provide for the payment of stipulated sums of money at definite periods. The parties have agreed upon the measure of damages for a breach of the contracts.

(2) Under no circumstances could the appellee be liable for damages on the theory of an anticipatory breach, except and unless there was an absolute unconditional and unambiguous repudiation of the entire contract. The appellee has not repudiated its contracts, but, upon the other

hand, has continuously and uniformally invoked the provisions thereof.

(3) The appellant bases his right of recovery upon what is known as the Rascoe Case. The doctrine therein announced in the majority opinion, is contrary to the great weight of authority, both state and federal.

(4) The contracts were not wholly executory, in that, assuming that the appellant was totally and presumably permanently disabled, within the meaning of the policy, the contracts were executed as to him.

(5) The appellee's obligations were contingent upon plaintiff's future condition from time to time, and unless the appellant shall continue disabled, appellee's liability will not arise.

(6) The application of the rule contended for by appellant would be disastrous as to other policyholders in the company.

(7) The appellant's damages, if any, other than such as are provided by the policy contracts, are too speculative and indefinite to constitute the basis for a judgment, since it is not possible, with any reasonable degree of certainty, to ascertain whether or not the appellant will recover, or how long the appellant will live, if totally and permanently disabled.

We respectfully submit that the judgment appealed from should be affirmed.

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